

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DAYLA D. NELSON)	
Claimant)	
v.)	
)	Docket No. 1,059,000
WESTVIEW MANOR)	
Respondent)	
and)	
)	
AMERISURE INSURANCE, CO.)	
Insurance Carrier)	

ORDER

Respondent requests review of the June 6, 2014, Award by Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on October 22, 2014.

APPEARANCES

David H. Ferris, of Wichita, Kansas, appeared for claimant. Douglas D. Johnson, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award.

Counsel informed the Board at oral argument there is no dispute claimant's permanent impairment of function is 20 percent to the whole body, and the ALJ correctly found claimant's task loss was 61.5 percent.

ISSUES

The ALJ found that as a result of claimant's November 25, 2011, accidental injury, she sustained a 20 percent permanent whole body functional impairment and awarded claimant permanent partial disability (PPD) benefits based on a 54 percent work disability, comprised of a 61.5 percent task loss and a 47 percent wage loss. The 61.5 percent task loss is midway between the task loss opinions of Drs. Murati and Stein.

Respondent contends claimant is capable of earning wages comparable to her pre-injury average weekly wage (AWW) and requests claimant's award be limited to her functional impairment.

Claimant asks the Board to adopt the ALJ's findings and affirm the Award.

The sole issue presented to the Board is: What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant worked for respondent for 25 years. When injured, claimant worked as a charge nurse. Her duties included checking vital signs, providing medications, occasionally restraining patients, and lifting and moving patients.

Claimant sustained personal injury by accident to her lower back on November 25, 2011, when she and two other workers cradle-lifted a resident into bed after finding him on the floor. Claimant testified she had no previous injuries or medical treatment to her back, although she admitted having received prior chiropractic adjustments.

A lumbar MRI scan was conducted on December 6, 2011, which revealed degenerative disk disease with disk herniations on the right at L4-L5 and L5-S1, and a small posterior annular tear at L3-L4.

Following unsuccessful conservative measures, claimant underwent surgical treatment on July 26, 2012, by Michael A. Chang, M.D., an orthopedic surgeon. The surgery consisted of laminectomies at L4-S1 and a 360 degree fusion, at the same levels, with grafting and postereolateral instrumentation. Dr. Chang provided post surgical treatment. On December 4, 2012, a functional capacity evaluation (FCE) found claimant could perform sedentary to light duty work for eight hours per day.

Claimant testified she was next treated by Dr. David Harris, a specialist in pain management, with epidural steroid injections and other medications. Claimant understood her restrictions from Dr. Harris were she could work no more than five hours per day, 25 hours per week, and could only be on her feet 33 percent of the time.

In March 2013, claimant returned to work part-time for respondent within Dr. Harris' restrictions. Claimant testified she had worked 37.5 hours per week before the injury, but after her surgery she could not work more than 22-23 hours per week

Dr. Harris released claimant from treatment on July 5, 2013, and recommended permanent medication management.

The ALJ entered a preliminary hearing Order on October 25, 2013, authorizing treatment with Jon Parks, M.D. Dr. Parks prescribed additional injections and medication. Claimant remained under the care of Dr. Parks at the time of the January 9, 2014, regular hearing. Claimant testified Dr. Parks did not restrict her activities.

On August 22, 2013, claimant was interviewed by Paul Hardin, a vocational consultant, at her counsel's request. Mr. Hardin identified 30 work tasks claimant performed in the five years preceding the accidental injury and described the physical demands associated with each task.

At her counsel's request, claimant was examined by Dr. Pedro Murati on August 22, 2013. After taking a history, reviewing medical records and performing a physical examination, Dr. Murati recommended chronic pain management, a possible change in medications and consideration of a spinal cord simulator. When claimant saw Dr. Murati, she continued to have pain in her low back to her right leg and hip, and had to reposition herself often due to low back pain.

Dr. Murati's diagnostic impression was status post L4 through S1 spinal fusion and failed back surgery syndrome. Dr. Murati defined failed back surgery syndrome as surgery with either no relief of pain or more pain than before.

Dr. Murati summarized claimant's restrictions in a four-hour workday: no bending, crouching and stooping; no crawling, lifting, carrying, pushing, and pulling greater than ten pounds; only rarely climbing stairs and ladders and squatting; occasional sitting, standing, walking and driving; alternate sitting, standing and walking; and allowing rest for 30 minutes after one and one-half hours of work. Dr. Murati testified claimant was not capable of working eight-hour shifts or full-time employment.

Dr. Murati rated claimant's permanent impairment of function at 20 percent to the whole body pursuant to the *AMA Guides*,¹ DRE Category IV.

Dr. Murati reviewed Paul Hardin's vocational report and opined claimant could no longer perform 73 percent of the work tasks identified by Mr. Hardin. If claimant lost her accommodated position with respondent, in Dr. Murati's opinion, she would be incapable of substantial, gainful employment and would be essentially and realistically unemployable. Dr. Murati did not agree with the FCE because he saw no scientific basis for such testing.

Claimant testified at the regular hearing she was still under the restrictions of Dr. Harris and was attempting to work within those restrictions. Claimant remained a charge

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

nurse with respondent, but her duties had changed. She no longer passed medications, pushed the medicine cart or assisted in picking up fallen patients.

Claimant testified she had not been free of low back pain since her accident. Her continuing pain was worse some days than others.

According to claimant, the work she currently performed at respondent seemed to aggravate her condition. At the time of the regular hearing, claimant worked on her feet more than 33 percent of the time in violation of Dr. Harris' restrictions.

Claimant earned \$878 per week at the time of her injury. The parties stipulated claimant's post-injury AWW was \$463.28.

Trudy Watts testified by deposition. She is a registered nurse and is the director of nursing at respondent's facility. Her duties included overseeing the nursing department; ordering supplies; consulting with visiting doctors and psychiatrists; occasionally working the floor; and conducting MDS assessments.

As director of nursing, Ms. Watts was in charge of scheduling the nursing staff. She testified she could provide claimant with enough weekly working hours, in compliance with claimant's restrictions, to enable her to earn wages comparable to the average weekly wage she earned when she was injured in November 2011. Ms. Watts suggested claimant could work additional hours, but claimant refused to do so because of her back pain. Ms. Watts did not know claimant's weight restriction.

Paul Stein, M.D., a neurosurgeon, testified he examined claimant at the request of respondent's attorney on May 7, 2012. Dr. Stein testified claimant's December 6, 2011, MRI of the thoracic spine was negative and the December 6, 2011, MRI of the lumbar spine showed disc herniations at L4-L5 and L5-S1 with a small annular tear at L3-L4. January 4, 2012, plain x-rays of the lumbar spine were essentially negative. Dr. Stein concluded claimant had failed conservative treatment and surgery was a reasonable consideration.

Dr. Stein examined claimant a second time on January 22, 2013. Claimant had undergone surgery and was not working. Claimant had benefitted from treatment, but she still expressed substantial complaints in the lower back and right lower extremity. Claimant took narcotic pain medication, muscle relaxant medication, a topical medication and used a TENS unit.

Dr. Stein reviewed a January 17, 2013, lumbar CT scan that revealed claimant's fusion had yet to heal adequately. He also reviewed a January 17, 2013, MRI of the lumbar spine, which showed mild disk bulging at L3-L4 with mild central canal narrowing and lateral recess narrowing. No significant disk protrusion or neural impingement was

seen at L5-S1. Dr. Stein testified he reviewed claimant's FCE which indicated claimant could return to a sedentary-light position. Dr. Stein recommended claimant remain under the care of Dr. Chang.

Dr. Stein testified he saw claimant a third time on August 20, 2013. Claimant told Dr. Stein her pain had worsened again in her lower back, her right flank, right buttocks, in the right inguinal area and into the right thigh. She found walking, standing still, sitting still and lying down worsened her pain and she had to change positions quite a bit. She reported intermittent numbness and tingling in the right lateral thigh

Dr. Stein concluded claimant had reached maximum medical improvement on the assumption Dr. Chang had determined her fusion was healing properly. In Dr. Stein's opinion, pursuant to the *Guides*, claimant sustained a 20 percent permanent impairment to the body as a whole. Dr. Stein adopted the restrictions of the FCE, including claimant ability to work a five-day week, eight hours a day.

Dr. Stein testified claimant could not perform 15 of the 30 work tasks identified by Mr. Hardin, for a 50 percent task loss.

Mr. Hardin testified claimant's pre-injury wage of \$878.53, when compared to claimant's post-injury wage of \$463.28, resulted in a 47 percent wage loss

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-510e(a)(2) states, in part:

(C) An employee may be eligible to receive permanent partial general disability compensation in excess of the percentage of functional impairment ("work disability") if:

(i) The percentage of functional impairment determined to be caused solely by the injury exceeds 7½ % to the body as a whole or the overall functional impairment is equal to or exceeds 10% to the body as a whole in cases where there is preexisting functional impairment; and

(ii) the employee sustained a post-injury wage loss, as defined in subsection (a)(2)(E) of K.S.A. 44-510e, and amendments thereto, of at least 10% which is directly attributable to the work injury and not to other causes or factors.

In such cases, the extent of work disability is determined by averaging together the percentage of post-injury task loss demonstrated by the employee to be caused by the injury and the percentage of post-injury wage loss demonstrated by the employee to be caused by the injury.

(D) "Task loss" shall mean the percentage to which the employee, in the opinion of a licensed physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the five-year period preceding the injury. The permanent restrictions imposed by a licensed physician as a result of the work injury shall be used to determine those work tasks which the employee has lost the ability to perform. If the employee has preexisting permanent restrictions, any work tasks which the employee would have been deemed to have lost the ability to perform, had a task loss analysis been completed prior to the injury at issue, shall be excluded for the purposes of calculating the task loss which is directly attributable to the current injury.

(E) "Wage loss" shall mean the difference between the average weekly wage the employee was earning at the time of the injury and the average weekly wage the employee is capable of earning after the injury. The capability of a worker to earn post-injury wages shall be established based upon a consideration of all factors, including, but not limited to, the injured worker's age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market. The administrative law judge shall impute an appropriate post-injury average weekly wage based on such factors. Where the employee is engaged in post-injury employment for wages, there shall be a rebuttable presumption that the average weekly wage an injured worker is actually earning constitutes the post-injury average weekly wage that the employee is capable of earning. The presumption may be overcome by competent evidence.

....

(iii) The injured worker's refusal of accommodated employment within the worker's medical restrictions as established by the authorized treating physician and at a wage equal to 90% or more of the pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.

The Board agrees with the ALJ that claimant's post-injury AWW represents the AWW claimant is capable of earning. A preponderance of the credible evidence does not establish that respondent offered claimant more hours of accommodated employment within claimant's restrictions, nor does the evidence support the conclusion claimant refused any such offer. Claimant did not refuse accommodated employment within medical restrictions as established by an authorized treating physician at a wage equal to 90 percent or more of claimant's pre-injury AWW. Respondent may have suggested claimant work additional hours, however, Ms. Watts admitted she was unaware of the weight lifting limitations in the restrictions discussed in the FCE, which Dr. Stein adopted; in the restrictions Dr. Murati imposed; and in the restrictions imposed by Dr. Harris. Ms. Watts was aware claimant was restricted to working no more than 25 hours per week.

The preponderance of the credible evidence establishes claimant is not capable of full-time employment.

Since respondent has not overcome the presumption that the post-injury AWW claimant is actually earning is the same as the AWW claimant is capable of earning, then claimant's wage loss is 47 percent, as found by the ALJ.

CONCLUSIONS

Claimant is entitled to PPD based on a work disability of 54 percent, consisting of a task loss of 61.5 percent and a wage loss of 47 percent.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated June 6, 2014, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of December, 2014.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Thomas Klein, Administrative Law Judge